Hong Leong Bank Bhd v Manducekap Hi-Tec Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D4–24–173 OF 2007
ROHANA YUSUF J
14 MARCH 2008

Civil Procedure — Interpleader summons — Application for — Whether interpleader summons an appropriate remedy to determine ambiguities in court orders

Civil Procedure — Interpleader summons — Costs — General rule as to costs in interpleader proceedings, exceptions to — Circumstances where applicant ought to pay costs

Civil Procedure — Interpleader summons — Preconditions to grant of relief — Whether applicant faced with two or more competing claims — Whether applicant faced a real as opposed to anticipated legal action — Rules of the High Court 1980 O 17 r 1

The first claimant maintained a current account ('the account') with the applicant. The first claimant became embroiled in a dispute involving its current board of directors ('the second claimant'); its former board of directors ('the third claimant') and its shareholders ('the fourth claimant'). On 22 May 2007, the third claimant was restrained by an ex parte order of the Kuala Lumpur High Court dated 15 May 2007 from controlling or managing the account. The second claimant, as the lawful board, was instead given control. Nevertheless, the applicant faced several threats of litigation and competing claims concerning the control and management of the account. The applicant thus applied for interpleader relief, requesting the High Court to determine and/or clarify the control and/or management of the account.

Held, dismissing the application with costs:

(1) In seeking interpleader relief under O17 r 1 of the Rules of the High Court 1980 ('RHC'), an applicant must genuinely face a potential suit by one or more persons. There must exist a real conflict between the

claimants. Mere anticipation of a legal suit is not sufficient (see para 8); *Watson v Park Royal Caterers Ltd* [1961] 2 All ER 146 followed.

(2) Further, the first claimant was an incorporated company having its own legal entity. The moneys in the account belonged to the first claimant. No shareholder or board had any claim to such moneys. Therefore, there could not be any competing claim to the account between the first claimant's shareholders or the board of directors. The owner was clearly the first claimant. There was thus nothing for the applicant to extricate itself from. The application did not meet the first requirement under O 17 r 1 of the RHC since the applicant was not faced with two or more competing claims. The applicant did not also face any real threat of litigation since the threats by the second and third claimants in the instant case could not be construed as threats of legal suit (see paras 11–12).

(3) In the instant case, the various court orders clearly determined the rightful authority to operate and manage the account. Even if any one or more of the orders were ambiguous, the applicant should have applied to clarify such ambiguity instead of applying for relief under O 17 of the RHC. An application under O 17 r 1 was not an appropriate remedy to determine any alleged ambiguity (see paras 13–14).

(4) Generally, no costs should be ordered against an applicant in an interpleader summons. However, in the instant case since: (i) the application was unnecessary; (ii) the applicant had refused to withdraw the application when given the opportunity to do so; and (iii) the application was made after an inordinate delay, the applicant should be made to pay costs (see paras 17–19).

[Bahasa Malaysia summary

Penuntut pertama telah mengekalkan akaun semasa ('akaun tersebut') dengan pemohon. Penuntut pertama terlibat dalam pertikaian dengan lembaga pengarah semasanya ('penuntut kedua'), bekas lembaga pengarahnya ('penuntut ketiga'), dan pemegang sahamnya ('penuntut keempat'). Pada 22 Mei 2007, penuntut ketiga disekat oleh perintah ex parte Mahkamah Tinggi Kuala Lumpur bertarikh 15 Mei 2007 daripada mengawal atau menguruskan akaun tersebut. Sebaliknya penuntut kedua, sebagai lembaga sah, telah diberikan kawalan tersebut. Meskipun begitu, pemohon berhadapan dengan beberapa ancaman litigasi dan saingan tuntutan berkaitan kawalan dan pengurusan akaun tersebut. Pemohon oleh itu memohon relief interplider, memohon Mahkamah Tinggi menentukan dan/atau menjelaskan kawalan dan/atau pengurusan akaun tersebut.

Diputuskan, menolak permohonan dengan kos:

(1) Dalam memohon relief interplider di bawah A 17 k 1 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), pemohon hendaklah benar-benar menghadapi kemungkinan guaman oleh seorang atau lebih daripada seorang. Konflik sebenar perlu wujud antara penuntut. Jangkaan semata-mata akan satu guaman undang-undang tidak memadai (lihat perenggan 8); *Watson v Park Royal Caterers Ltd* [1961] 2 All ER 146 diikuti.

(2) Dalam kes ini, penuntut pertama adalah syarikat yang diperbadankan yang memiliki entiti sendiri. Wang dalam akaun tersebut adalah milik penuntut pertama. Tiada pemegang saham atau lembaga yang boleh menuntut terhadap wang sedemikian. Oleh itu, tidak sepatutnya terdapat apa-apa tuntutan yang bersaing terhadap akaun tersebut antara pemegang saham penuntut pertama atau lembaga pengarah. Pemilik jelas adalah penuntut pertama itu. Oleh itu tiada apa-apa untuk pemohon melepaskan dirinya. Permohonan itu tidak memenuhi keperluan pertama di bawah A 17 k 1 KMT memandangkan pemohon tidak berhadapan dengan dua atau lebih tuntutan yang bersaing. Pemohon juga tidak berhadapan dengan apa-apa ancaman sebenar litigasi memandangkan ancaman oleh penuntut kedua dan ketiga dalam kes ini tidak boleh dianggap sebagai ancaman guaman undang-undang (lihat perenggan 11–12).

(3) Selanjutnya, pelbagai perintah mahkamah jelas menentukan kuasa sah menjalankan dan menguruskan akaun tersebut. Jikapun salah satu atau lebih daripada perintah tersebut tidak taksa, pemohon patut memohon untuk menjelaskan ketaksaan itu dan bukan memohon relief di bawah A 17 KMT. Permohonan di bawah A 17 k 1 bukan remedi yang sesuai untuk menentukan apa-apa ketaksaan yang dikatakan (lihat perenggan 13–14).

(4) Secara amnya, tiada kos patut diperintahkan terhadap pemohon dalam saman interplider. Walau bagaimanapun, dalam kes ini memandangkan: (i) permohonan itu tidak perlu; (ii) pemohon enggan menarik balik permohonan itu apabila diberikan peluang untuk berbuat demikian; dan (iii) permohonan itu dibuat selepas kelewatan yang melampau, pemohon patut didesak untuk membayar kos (lihat perenggan 17–19).]

Notes

For a case on costs in interpleader summons, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) para 3677.

For cases on application for interpleader summons generally, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3674–3689.

For cases on preconditions to grant of relief in interpleader summons, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3684–3685.

Cases referred to

Ming Holdings (M) Sdn Bhd v Yusof Latif Holdings (M) Sdn Bhd [2006] 4 MLJ 189, CA (refd)

Peter Yip Shou Shan v George Kent (M) Bhd & Anor [2002] 2 MLJ 146; [2002] 2 CLJ 205, HC (folld)

RHB Bank Bhd v Amalan Tepat Sdn Bhd & Ors [2007] 7 CLJ 379, HC (refd)

RHB Bank Bhd v Comax Sdn Bhd & Anor [1999] 3 CLJ 552, HC (refd)

Tong Lee Co Pte Ltd v Khiow Meng & Anor Appeal No 28 of 199 2 Mallal's Digest para 285 (refd)

Watson v Park Royal Caterers Ltd [1961] 2 All ER 146, HC (folld)

Legislation referred to

Rules of the High Court 1980 O 17 r 1, O 17 r 1(a), O 17 r 1(b), O 17 r 3(3), O 17 r 8

Kevin Chung Li Kien (James CH Chew with him) (SN Yap & Associate) for the applicant/interpleader.

S Sumathi (R Rajaseelan and S Kanaga Sundran with her) (Sumathi, Shanmugam Divakaran Nair & Co) for the first and second claimants.

S Ravindran (Sivananthan & Co) for the third claimant.

Ragumaren (Ragumaren & Co) for the fourth claimant.

Rohana Yusuf J:

THE APPLICATION

[1] The applicant, Hong Leong Bank Bhd ('the bank') by way of interpleader summons is seeking relief in relation to the Current Account No 0320002677–1 of Manducekap Hi-Tec Sdn Bhd ('Manducekap') cited as the first claimant. The other claimants cited are the the present board of directors ('BOD') of Manducekap ('the second claimant'), the former members of BOD ('the third claimant') and the shareholders of Manducekap (the fourth claimant'). Essentially, the bank is seeking the court's direction regarding the management and handling of the said first claimant's account in relation to various court orders viz; the ex parte order dated 23 November 2006, another order dated 5 January 2007 issued under Suit No MT3–22–1495 of 2006 ('the Shah Alam suit') and an ex parte order of the Kuala Lumpur High Court dated 15 May 2007 in Suit No D4–22–1503 of 2006 ('the KL High Court suit').

FACTUAL BACKGROUND

[2] The ex parte order dated 23 November 2007 issued by the High Court

of Shah Alam was set aside by the 5 January 2007 order of the same court which, inter alia, resulted in the authority to operate the account of Manducekap to be in the hands of the third claimant. Upon being served with the order, the bank took step to freeze the first claimant's account. Search of Companies Commission of Malaysia's ('CCM') record on 17 November 2006 showed that the lawful board of directors ('BOD') of Manducekap was then the third claimant. Based on that, the bank allowed the third claimant to operate the account. The second claimant raised queries and wrote to the bank (in exh A-7 in encl 2) threatening legal action.

[3] On 22 May 2007, the fourth claimant served on the bank an ex parte order of the KL High Court suit dated 15 May 2007 to restrain the third claimant from controlling or managing the account and the second claimant was given control as a lawful BOD. On 23 May 2007, CCM record showed that the second claimant was the lawful BOD.

[4] The bank on 30 May 2007 took this interpleader summons seeking clarifications on the above court orders in relation to the management and operation of the account of the first claimant.

[5] On 26 June 2007 a consent order was entered with the CCM under the KL High Court suit, where it was recorded that the second claimant was agreed to, by the parties to be the lawful BOD. On 22 October 2007 the first and second claimants recorded a consent order recognising the second claimant as the lawful BOD and thereby validated the company's extraordinary general meeting ('EGM') of 18 October 2006.

THE APPLICATION

[6] This interpleader summons is made under O 17 r 1 of the Rules of the High Court 1980 ('RHC') on the grounds that the bank is faced with the following issues:

(a) that there are competing claims on the management of the account and control of monies in the account of Manducekap; and

(b) that there are threats of litigation and real threat of being sued because the applicant received threats from both the second and third claimants.

It was further submitted that this application is bona fide because the bank is aware of the ongoing disputes in the Shah Alam High Court and the Kuala Lumpur High Court on the composition of the BOD of the Manducekap which relates to the EGM of 18 October 2006. The applicant also contended that it has complied with the requirement of O 17 r 3(3) of the RHC in that:

(a) the bank does not have interest in the monies in the account;

(b) the bank is not in collusion with any of the parties; and

(c) the bank is willing and able to surrender control and management of the monies or account to court or any order of the court.

INTERPLEADER SUMMONS

[7] A discretionary relief by way of interpleader proceedings has its objective of providing a relief or to extricate or disentangle an applicant from the embarrassment of being sued, or likely to be sued by more than one party in respect of the same subject matter. The above object of an interpleader summons is explained in the Singapore High Court case of *Tong Lee Co Pte Ltd v Khiow Meng & Anor* Appeal No 28 of 199 2 Mallal's Digest para 285. The true nature and effect of an interpleader summons made under O 17 r (1) in its strictest sense is not a proceeding against any person. Thus, any person under the liability as mentioned under O 17 r 1(a) or (b) may apply for relief by way of an interpleader summons.

[8] Before a relief can be sought under O 17 r 1 it is essential that the applicant must be genuinely faced with a potential suit by one or more persons. Thus there must be in existence a real conflict between the claimants. A mere anticipation of a legal suit would not suffice (see *Watson v Park Royal Caterers Ltd* [1961] 2 All ER 146).

[9] In *RHB Bank Bhd v Amalan Tepat Sdn Bhd & Ors* [2007] 7 CLJ 379, an interpleader summons was taken by the RHB Bank seeking the determination of the court on whether the balance of housing loan of the second and third defendants should be released to the developer based on an irrevocable undertaking by the defendants. The undertaking made was for the plaintiff to release the money to the developer. When the defendants terminated the sale and purchase agreement pending, the validity of which to be determined Low Hop Bing J (now JCA) made a determination sought by the RHB Bank by interpleader summons, for the balance of the loan to be released to the developer based on the said undertaking. The application of RHB Bank for relief by way of an interpleader summons was allowed because it was commenced by reason of inability by the bank to resolve dispute.

[10] In *RHB Bank Bhd v Comax Sdn Bhd & Anor* [1999] 3 CLJ 552 an interpleader summons taken out by the bank was not allowed on the ground, inter alia, that there was no real foundation for expectation of being sued by at least two or more persons, when it was found that the second defendant in that case has no basis of claim as opposed to the first defendant.

[11] From the facts of the present case, Manducekap is a company incorporated having its own legal entity. In the Court of Appeal decision in *Ming Holdings (M) Sdn Bhd v Yusof Latif Holdings (M) Sdn Bhd* [2006] 4 MLJ 189 it was held that:

> It was trite that a company is a separate individual from its shareholders and directors and the property of the company belongs to the company, not to the shareholders or directors.

It is clear for this case authority that the monies in the account of Manducekap can only belong to the company as no shareholder or BOD has any claim to such monies. It is obvious therefore that there cannot be any competing claim on the account of the company between shareholders or BOD, as the owner is clearly the company. In view of the clear legal position on the ownership of the account there cannot be any competing claim by the claimants and there is nothing for the applicant to extricate itself from. This application therefore, has not met the first requirement under O 17 r 1 of the RHC since the applicant is not faced with two or more competing claims.

[12] Following from that, obviously the applicant was not faced with any real threat of a legal suit to justify an interpleader relief. The purported legal threat in letters from the second claimant in exh A-7 and the third claimant in exh A-6 of encl 2 cannot be construed as threats of legal suit. As decided in the case of *RHB Bank Bhd v Comax Sdn Bhd & Anor* [1999] 3 CLJ 552 the expectation to be sued must be based on some real foundation. A mere anticipation of a suit and a claim which clearly has no legal basis, as in this case, cannot be said to be a real threat.

[13] Not only that the legal position of the account clearly belongs to the first claimant in the present case, there are also in existence court orders that determine the rightful authority to operate and manage the account. In the face of the ex parte order of 15 May 2007, there is no reason why the applicant should be facing with any difficulty on the authority to operate the account of Manducekap. Furthermore, the third claimant has been restrained by the KL High Court order dated 15 May 2007 vide Suit No D4–22–1503 of 2006 and the fourth claimant by encl 6 also admitted that the monies in the account belong to the company. The only party authorised to operate the account is the second claimant.

[14] The alleged ambiguity raised by learned counsel for the applicant on 15 May 2007 order of the court relates to para 5, which states:

That the *purported directors and /or their agent/servants* do forthwith hand over all assets of the first defendant including but not limited to vehicles, to the lawful board.

(Emphasis added.)

The applicant contended that the above paragraph of the order is unclear as to whether it refers to the applicant bank because the bank is an agent of the company but not an agent of the BOD. Such ambiguity (if any) does not qualify the pre-requisite of an application by way of interpleader summons and are not situations envisaged under O 17 r 1. The applicant could have sought clarification on the order instead of obtaining relief by way of interpleader summons because it is not faced by or caught between two or more threat to legal suit. Thus even assuming that it is true that the order is ambiguous, an application under O 17 r 1 would not be appropriate to determine the alleged ambiguity.

[15] It is apparently clear that this application has been inappropriately taken by its failure to satisfy the strict requirement of O 17 r 1. Apart from that, it has failed to state each of the claimants' purported rights. This application should not be allowed.

COSTS

[16] In principle, no costs should be ordered against an applicant in an interpleader summons. This is because, as stated earlier the true nature and effect of an interpleader summons under O 17 r 1 is not a proceeding against any person. In *RHB Bank Bhd v Comax Sdn Bhd & Anor*, the High Court made no order to costs though the application was dismissed. In *RHB Bank Berhad v Amalan Tepat* the High Court did not make order as to costs because the application was commenced by reason of the applicant's disability to resolve the disputes.

[17] Unlike the above cases, firstly, I find that the present application is in the first place unnecessary as there is no competing claims or threat to a legal suit faced by the applicant. Secondly, the applicant having filed this application before consent orders were obtained with CCM, has been given a chance by all parties who appeared in court on the 3 July 2007 to withdraw the application but had refused to do so and proceeded with this unnecessary application. Unnecessary or inappropriate application should render the applicant liable to costs. In *Peter Yip Shou Shan v George Kent (M) Bhd & Anor* [2002] 2 MLJ 146; [2002] 2 CLJ 205, Abdul Aziz Mohamad J (now FCJ) held that the costs in an interpleader summons should instead be paid by the claimant who fails the claim and such claimant should also pay costs for the successful claimant. His Lordship held in that case that, if the senior

assistant registrar had found the application not to have been properly brought the proper order to make would be to dismiss the application and made the applicant pay costs.

[18] Thirdly, there has also been inordinate delay by the applicant in making this application when the applicant has frozen the account on 11 January 2007 and only after four months filed this application on 30 May 2007. A delay of four months to take up this summons interpleader shows that the applicant has not acted with reasonable promptitude. In the English case of *Watson v Park Royal (Caterers) Ltd* [1961] 2 All ER 346, the court ordered costs to be paid by the applicant who delayed the application when it could have interpleaded at an earlier stage, instead.

[19] In view of the conduct of the applicant herein and guided by the above decisions on the issue of costs, in my view it would be appropriate that the applicant be made to pay costs. Thus for all these reasons I hereby dismiss the application in encl 1 with costs to be paid to the first, second and fourth claimants, the costs of which is to be taxed. No order to costs is made to the third claimant who is in support of this application.

FURTHER ORDER

[20] At the request of the applicant, I hereby made a further order under O 17 r 8, for the applicant to issue a bankers' cheque in the full amount of the said account in favour of Manducekap, the first claimant to be delivered to the solicitor for the first claimant, within four days from the date of this order.

Application dismissed with costs.

Reported by Andrew Christopher Simon